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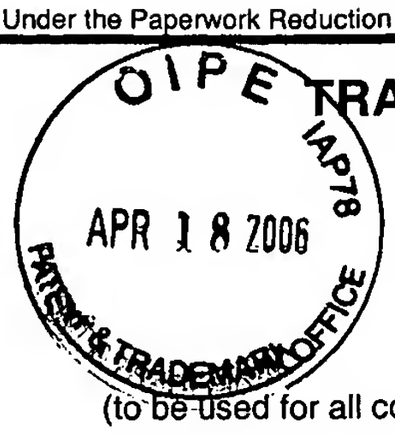

TRANSMITTAL FORM

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission	32

Application Number	10/643,055
Filing Date	August 18, 2003
First Named Inventor	Reusche
Art Unit	3644
Examiner Name	Trinh T. Nguyen
Attorney Docket Number	14809US02

ENCLOSURES (check all that apply)

- ☒ Fee Transmittal Form
  - ☐ Fee Attached
- ☐ Amendment/Reply
  - ☐ After Final
  - ☐ Affidavits/declaration(s)
- ☐ Extension of Time Request
- ☐ Express Abandonment Request
- ☐ Information Disclosure Statement
- ☐ Certified Copy of Priority Document(s)
- ☐ Reply to Missing Parts/ Incomplete Application
  - ☐ Reply to Missing Parts under 37 CFR 1.52 or 1.53
- ☐ Drawing(s)
- ☐ Licensing-related Papers
- ☐ Petition
- ☐ Petition to Convert to a Provisional Application
- ☐ Power of Attorney, Revocation Change of Correspondence Address
- ☐ Terminal Disclaimer
- ☐ Request for Refund
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  - ☐ Landscape Table on CD
- ☐ After Allowance Communication to TC
- ☐ Appeal Communication to Board of Appeals and Interferences
- ☒ Appeal Communication to TC (*Appeal Notice, Brief, Reply Brief*)
- ☐ Proprietary Information
- ☐ Status Letter
- ☒ Return-Receipt Postcard
- ☐ Other Enclosure(s) (please identify below):

Remarks	

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm	McAndrews Held & Malloy, Ltd.
Signature	David Z. Petty
Printed Name	David Z. Petty
Date	April 13, 2006

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Name (Print/type)	David Z. Petty	Registration No. (Attorney/Agent)	52,119
Signature	David Z. Petty	Date	April 13, 2006

PTO/SB/17 (01-06)
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Fees pursuant to the consolidated Appropriates Act. 2005 (H.R. 4818).

FEE TRANSMITTAL for FY 2006

☐ Applicant claims small entity status. See 37 CFR 1.27

		Complete if Known	
		Application Number	10/643,055
		Filing Date	August 18, 2003
		First Named Inventor	Reusche
		Examiner Name	Trinh T. Nguyen
		Art Unit	3644
TOTAL AMOUNT OF PAYMENT	($) 250.00	Attorney Docket No.	14809US02

METHOD OF PAYMENT (check all that apply)

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1. BASIC FILING, SEARCH, AND EXAMINATION FEES

	FILING FEES		SEARCH FEES		EXAMINATION FEES		
Application Type	**Fee ($)**	**Small Entity Fee($)**	**Fee($)**	**Small Entity Fee($)**	**Fee($)**	**Small Entity Fee($)**	**Fees Paid($)**
Utility	300	150	500	250	200	100	
Design	200	100	100	50	130	65	
Plant	200	100	300	150	160	80	
Reissue	300	150	500	250	600	300	
Provisional	200	100	0	0	0	0	

2. EXCESS CLAIM FEES

Fee Description	**Fee($)**	**Small Entity Fee($)**
Each claim over 20 (including Reissues)	50	25
Each independent claim over 3 (including Reissues)	200	100
Multiple dependent claims	360	180

Total Claims		**Extra Claims**	**Fee($)**		**Fee Paid ($)**
_____	-20 or HP	_____	x _____	=	_____

HP = highest number of total claims paid for, if greater than 20

Indep. Claims		**Extra Claims**	**Fee($)**		**Fee Paid ($)**
_____	-3 or HP	_____	x _____	=	_____

HP = highest number of independent claims paid for, if greater than 3

Multiple Dependent Claims	
Fee	**Fee Paid ($)**
_____	_____

3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is $250 ($125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets		**Extra Sheets**		**Number of each additional 50 or fraction thereof**	**Fee($)**		**Fee Paid($)**
_____	-100	_____	/50	_____ (round up to a whole number)	x _____	=	_____

4. OTHER FEE(S)

	Fee Paid($)
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SUBMITTED BY

Signature	/David Z. Petty/	Registration No. (Attorney/Agent)	**52,119**	Telephone	(312)775-8000
Name (print/type)	**David Z. Petty**			Date	April 13, 2006

AF
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UNITED STATES PATENT AND TRADEMARK OFFICE
Docket No. 14809US02

In the Application of:	**CERTIFICATE OF MAILING**
Reusche et al.	I hereby certify that this correspondence is being deposited, with sufficient postage, with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief -- Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.
Serial No.: 10/643,055	
Filed: August 18, 2003	
For: Water Agitation System for Water Retention Structure	David Z. Petty Reg. No. 52,119
Examiner: Trinh T. Nguyen	
Group Art Unit: 3644	Date: April 13, 2006
Confirmation No.: 3111	

APPEAL BRIEF

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

The Applicants respectfully request that the Board of Patent Appeals and Interferences reverse the final rejection of claims 1-12, 14-25, and 27-34 of the present application. The Applicants note that this Brief on Appeal is timely because it is being filed within two months of February 21, 2006, which was the mailing date of the Notice of Appeal.

REAL PARTY IN INTEREST
(37 C.F.R. § 41.37(c)(1)(i))

The real party in interest is Allied Precision Industries, Inc., assignee of the present application, having a place of business at 705 East North Street, Elburn, Illinois, 60119.

RELATED APPEALS AND INTERFERENCES
(37 C.F.R. § 41.37(c)(1)(ii))

Not applicable.

STATUS OF THE CLAIMS
(37 C.F.R. § 41.37(c)(1)(iii))

The present application originally included 57 claims.[1] The Examiner required the Applicants to select a single species from Species A-G for prosecution on the merits, to which the claims would be restricted if no generic claim is held allowable.[2] The Applicants elected Species A, on which claims 1-12, 14-25, and 27-34 read.[3] Claims 13, 26, and 35-57 were withdrawn from consideration.[4] Claims 1-12, 14-25, and 27-34 are pending and remain rejected. The Applicants identify claims 1-12, 14-25, and 27-34 as the claims that are being appealed. The text of the pending claims is provided in the Claims Appendix.

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[1] *See* Present Application ("Application") at pages 13-20.
[2] *See* March 4, 2004 Office Action at page 2.
[3] *See* March 11, 2004 Response at page 2.

STATUS OF AMENDMENTS
(37 C.F.R. § 41.37(c)(1)(iv))

Applicants did not amend any of pending claims 1-12, 14-25, and 27-34 subsequent to the final office action mailed January 31, 2006.

SUMMARY OF CLAIMED SUBJECT MATTER
(37 C.F.R. § 41.37(c)(1)(v))

Embodiments of the present invention generally relate to water retention structures, such as bird bath basins, livestock water tanks/troughs, swimming pools, small ponds, fish tanks, and the like, and more specifically to a water agitator for placement in a water retention structure, to agitate or circulate water contained in the water retention structure.[5]

Embodiments of the present invention provide a water agitation system configured to be positioned within a water retention structure, including, for example, a main body 10 positionable within a water retention area 112 of the water retention structure 108 and comprising a base 18 removably interconnected to a cover 20 with an inner compartment 22 defined between the base 18 and cover 20.[6] The agitation system further includes an agitator 16 operatively connected to a motor 14 housed within the main body 10 and that is connected to a distal end 47 of a drive shaft 44 that extends outwardly from the main

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[4] *See* September 20, 2004 Amendment Under 37 C.F.R. § 1.111 at page 13.
[5] *See* present application at page 1, lines 4-7.
[6] *See id.* at Figures 3, 5A, and 10, and, *e.g.*, page 4, lines 22-26 and page 6, lines 3-13.

body 10.[7] The agitator 16 includes at least one agitation member 42 outwardly extending from a lateral surface 43 of the distal end 47 of the drive shaft 44.[8] The motor 14 is configured to rotate the agitator 16 in order to stir water retained within the water retention structure 112 wherein the agitation member 42 is operable to stir the water within the water retention structure 112.[9] The motor 14 is positioned within the inner compartment 22.[10]

Embodiments of the present invention also provide a water agitation system for use with a water retention structure, including, for example, a motor 14 operatively connected to a proximal end 45 of a drive shaft 44,[11] a base 18 supporting the motor 14,[12] a cover 20 positioned over the motor 14 and being removably interconnected to the base 18,[13] and an inner compartment 22 defined between a perimeter of the base 18 and the cover 20 with the motor 14 being positioned within the inner compartment 22.[14] The water agitation system further includes a blade assembly 40 extending outwardly from the drive shaft 44 with the motor 14 operable to rotate the blade assembly 40 in order to stir water retained within the water retention structure.[15]

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[7] *See id.* at Figures 3 and 5A, and, *e.g.*, page 5, lines 6-9, and page 6, lines 22-28.
[8] *See id.* at Figure 3, and, *e.g.*, page 6, lines 22-30.
[9] *See id.* at Figure 3, and, *e.g.*, page 6, line 15-page 7, line 4.
[10] *See id.* at Figures 3 and 5A, and, *e.g.*, page 5, lines 14-15.
[11] *See id.* at Figures 3 and 5A, and, e.g., page 6, lines 21-24.
[12] *See id.* at Figure 5A, and, *e.g.*, page 5, lines 6-15 and 20-24.
[13] *See id.* at Figures 3 and 5A, and, *e.g.*, page 5, lines 10-15 and page 6, lines 6-8.
[14] *See id.* at Figure 5A, and, *e.g.*, page 5, lines 10-15.
[15] *See id.* at Figure 3, and, *e.g.*, page 6, line 15-page 7, line 4.

Embodiments of the present invention also provide a water agitation system adapted to be positioned within a water retention structure configured to receive and retain water, including, for example, a main body 10 positioned within a water retention area 112 of the water retention structure 108 with the main body 10 having a base 18 removably secured to a cover 20 and an inner compartment 22 defined between the base 18 and cover 20.[16] The system may also include support members 50 supporting the main body 10 above a bottom surface 110 of the water retention structure 108 and the support members 50 may include a plurality of legs 52 that extend downwardly from the main body 10.[17] The system may also include an agitator 16 operatively connected to a motor 14 positioned within the inner compartment 22 of the main body.[18] The agitator 16 is connected to a distal end 45 of a drive shaft 44 that extends outwardly from the main body 10 and the agitator 16 has at least one blade 42 outwardly extending from a lateral surface 43 of the drive shaft 44 that is rotatably driven by the motor 14 in order to stir water retained within the water retention structure 108.[19]

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL
(37 C.F.R. § 41.37(c)(1)(vi))

Claims 1-5, 7, 8, 10, 12, 14-18, 20, 21, 23, 25, 27-30, and 33 stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,336,399 ("Kajisono").

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[16] *See id.* at Figures 3, 5A, and 10, and, *e.g.*, page 4, lines 22-24, page 5, lines 10-12, and page 6, lines 3-8.
[17] *See id.* at Figures 3 and 10, and, *e.g.*, page 7, lines 8-18.
[18] *See id.* at Figures 3 and 5A, and, *e.g.*, page 5, lines 5-15 and page 6, lines 14-16.

Claims 6, 19, and 31 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Kajisono in view of Official Notice, or in the alternative, U.S. Pat. No. 5,465,279 ("Bengel"). Claims 9, 22, and 32 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Kajisono in view of U.S. Patent No. 4,166,086 ("Wright"). Claims 11, 24, and 34 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Kajisono in view of U.S. Patent No. 3,836,130 ("Earhart").

ARGUMENT
(37 C.F.R. § 41.37(c)(1)(vii))

I. Kajisono Does Not Anticipate Claims 1-5, 7, 8, 10, 12, 14-18, 20, 21, 23, 25, 27, 30, and 33

The Examiner has maintained the rejections of claims 1-5, 7, 8, 10, 12, 14-18, 20, 21, 23, 25, 27-30, and 33 as being anticipated by Kajisono. However, Kajisono does not teach, nor suggest, all the limitations of claims 1-5, 7, 8, 10, 12, 14-18, 20, 21, 23, 25, 27-30, and 33. "'A claim is anticipated only if **each and every element** as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.'" *See* Manual of Patent Examining Procedure (MPEP) at 2131 (internal citation omitted). Further, "'[t]he identical invention **must be shown in as complete detail** as it is contained... in the claim.'" *See id.* (internal citation omitted).

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[19] *See id.* at Figure 3, and, *e.g.*, page 6, line 15-page 7, line 4.

Kajisono discloses an "apparatus for purifying and activating water." Kajisono at Abstract. The apparatus includes a drive shaft having a hollow inside, a capsule secured to a lower end of the drive shaft, a device for supporting the drive shaft for rotation so that an upper opening of the drive shaft is positioned above the surface of water and the capsule is positioned in the water, and a motor for rotationally driving the drive shaft. *Id.* The capsule includes a plurality of small apertures communicating with the hollow inside of the drive shaft. *Id.* As discussed below, Kajisono does not expressly or inherently describe "every element as set forth" in the claims of the present application.

A. Kajisono Does Not Teach, Nor Suggest, Agitation Members Or Blades Extending From Lateral Surfaces Of A Drive Shaft

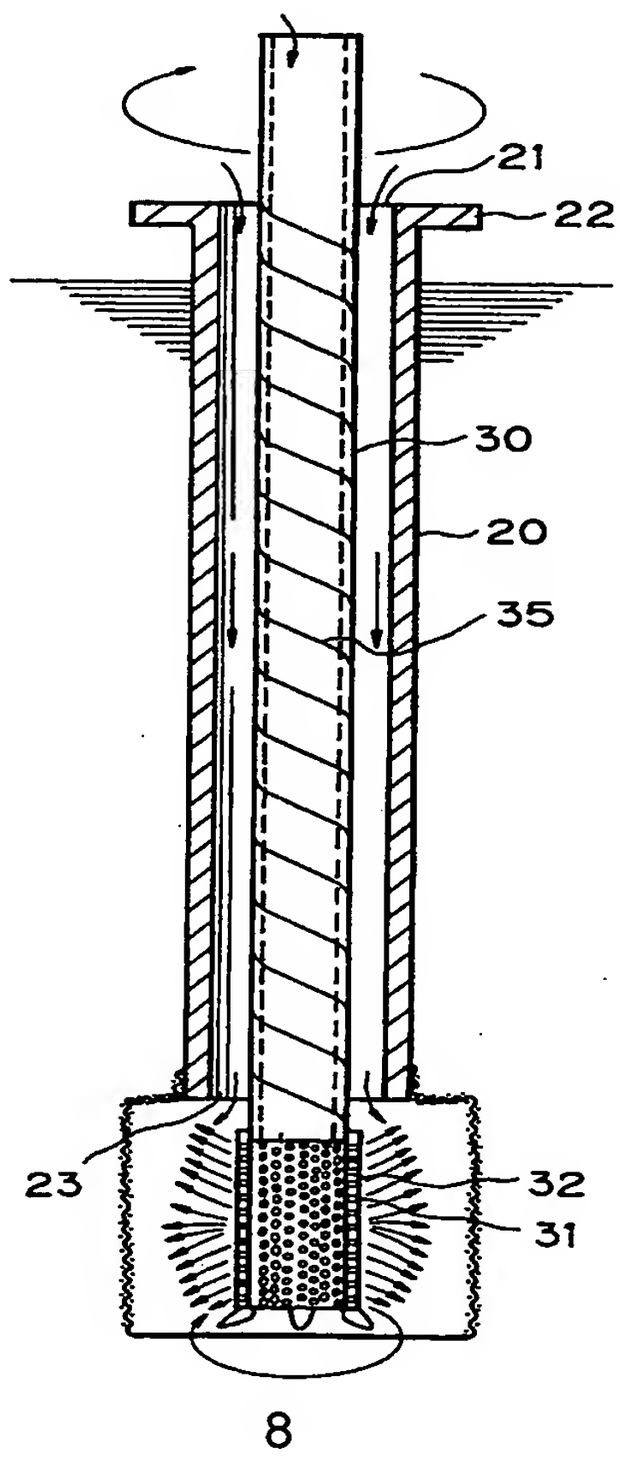
Kajisono does not teach, nor suggest, an "agitator comprising at least one agitation member outwardly extending from a lateral surface of said distal end of said drive shaft" as recited in claim 1, "a blade assembly extending outwardly from said drive shaft" as recited in claim 14, or "an agitator having at least one blade outwardly extending from a lateral surface of said drive shaft" as recited in claim 27. The Examiner states that Kajisono discloses an "agitator comprising at least one agitation member outwardly extending from a lateral surface of said distal end of said drive shaft." *See* January 31, 2006 Office Action, at p. 2. As support, the Examiner cites Kajisono at column 4, lines 40-50 and Figure 7, asserting that "Kajisono discloses impellers/agitation members outwardly extending from a lateral surface of the distal end

of the drive shaft . . . " *See id.* Kajisono states the following:

> The drive shaft 30 and **capsule** 32 may be formed, for example, from aluminum. The drive shaft 30 and **capsule 32 may be connected together**, for example by means of screw connection. Preferably, the diameter of the **capsule** is larger than that of the drive shaft. This is because, as will be explained in more detail below, the **capsule** may serve as a kind of propeller to cause negative pressure in the vicinity of the lower end of the outer casing when the drive shaft is rotated at a high speed. Accordingly, it is preferable to provide impellers, as shown in FIG. 7, so as to cause increased negative pressure.

Kajisono at column 4, lines 38-49 (emphasis added). Figure 7 is shown below:

Fig. 7



However, the above passage and figure from Kajisono simply do not disclose the aforementioned limitations from claims 1, 14, and 27.

1. Kajisono Does Not Teach, Nor Suggest, Blades Or An Agitator Extending From A Drive Shaft

First, Kajisono clearly states that the capsule 32 and drive shaft 30 are connected together. In other words, **the capsule is not part of the drive shaft**, but is connected to the drive shaft. Claims 1, 14, and 27 recite that the agitation member or blades outwardly extend from the drive shaft. However, the "members" shown in Figure 7 and asserted by the Examiner to be "impellers" **extend from the capsule 32** (which is separately connected to the drive shaft 30) **and not from the drive shaft 30 itself**. Therefore, Kajisono does not teach, nor suggest, an "agitator comprising at least one agitation member outwardly extending **from . . . said drive shaft**" as recited in claim 1, "a blade assembly extending outwardly **from said drive shaft**" as recited in claim 14, or "an agitator having at least one blade outwardly extending **from . . . said drive shaft**" as recited in claim 27. Thus, at least for this reason, Kajisono does not anticipate claims 1-5, 7, 8, 10, 12, 14-18, 20, 21, 23, 25, 27-30, and 33.

2. Kajisono Does Not Teach, Nor Suggest, An Agitator Extending From A Lateral Surface Of A Drive Shaft

Second, the Examiner draws attention to the curved lines downwardly extending from the **bottom of the capsule** 32 in Figure 7 and the statement that "it is preferable to provide impellers" from the above passage in support of the rejection. *See* January 31, 2006 Office Action at pp. 2-3 and 7. However, even assuming these un-numbered

and un-referenced curved lines shown in Figure 7 are indeed "impellers" as the Examiner asserts, they certainly do not "outwardly extend[] from a **lateral surface** of ... said **drive shaft**," as recited in claims 1 and 27 of the present application. Rather, the ambiguous curved lines shown in Figure 7 extend from a **bottom of the capsule 32**, not from **lateral surfaces** of the capsule 32 -- and certainly not from the lateral surfaces of the drive shaft 30. Therefore, Kajisono does not teach, nor suggest, an "agitator comprising at least one agitation member outwardly extending from a **lateral surface** of said distal end of said drive shaft" as recited in claim 1 or "an agitator having at least one blade outwardly extending from a **lateral surface** of said drive shaft" as recited in claim 27. Thus, at least for this reason, Kajisono does not anticipate claims 1-5, 7, 8, 10, 12, 27-30, and 33.

B. Kajisono Does Not Teach, Nor Suggest, Agitation Members Or Blades Stirring Water Within The Water Retention Structure

Kajisono does not teach, nor suggest, "said motor configured to rotate said agitator in order to stir water retained within the water retention structure, wherein said at least one agitation member is operable to stir the water within the water retention structure" as recited in claim 1, "said motor operable to rotate said blade assembly in order to stir water retained within the water retention structure" as recited in claim 14, and "one blade . . . that is rotatably driven by said motor in order to stir water retained within the water retention structure" as recited in claim 27. The Examiner asserts that

these limitations are taught in column 4, lines 40-50 and Figure 7 of Kajisono. *See* January 31, 2006 Office Action, at p. 2-5.

However, contrary to the assertions of the Examiner, Kajisono simply does not teach, nor suggest, a motor configured to rotate blades in order to stir water within the water retention structure. Rather, Kajisono teaches that the capsule 32 "may serve as a kind of propeller to cause **negative pressure** in the vicinity of the lower end of the outer casing when the drive shaft is rotated" and "it is preferable to provide impellers . . . so as to **cause increased negative pressure**." Kajisono at col. 4, lines 44-49. In other words, Kajisono discloses impellers that specifically operate to create negative pressure in the capsule 32 in order to draw fluid into the capsule 32 so that bubbles are ejected from apertures within the capsule 32. Nowhere does Kajisono teach or suggest the limitation of a motor configured to rotate impellers to **stir water within the water retention structure**, despite the Examiner's efforts to read such a teaching into the text. Moreover, the Examiner previously acknowledged that Kajisono does not teach blades stirring water within a water retention structure. *See* January 31, 2006 Office Action at p. 7 ("Applicant further argues that Kajisono does not teach the blades stirring water within the water retention structure, the Examiner acknowledges the argument.").

The Examiner further argues that blades stirring water is an "intended or desired use and is not a positive limitation but only requires the ability to so perform [and] therefore, it does not constitute a limitation in any patentable sense" and "that it is well

settled case law that such limitations, which are essentially method limitations . . . do not serve to patentably distinguish the claimed structure over that of a reference." *See* January 31, 2006 Office Action at p. 7. However, the case law that is more recent than those cases cited by the Examiner in support of the rejection clearly indicates that functional limitations **can be considered** in determining the patentability of an apparatus claim. *See In re Stencel*, 828, F.2d 751, 755 (Fed. Cir. 1987) ("Stencel is not inhibited from claiming his driver, limited by the statement of its purpose, and further defined by the remaining clauses of the claims at issue, when there is no suggestion in the prior art of a driver having the claimed structure **and purpose**.") (emphasis added); *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1363 (Fed. Cir. 1999) ("The functional language is, of course, an additional limitation in the claim."); *Ethyl Molded Prods. Co. v. Betts Package Inc.*, 9 U.S.P.Q.2d 1001, 1030 (E.D. Kent. 1988) ("[A]ll limitations in a claim must be considered. The functional limitations in the '851 Patent clearly distinguish . . . over the prior art, which never suggested those functions."). Even *In re Pearson*, which the Examiner cited in support of the rejection acknowledges that limitations of function or intended use can be used to distinguish an invention over prior art. *See In re Pearson*, 181 U.S.P.Q. 641, 644 (CCPA 1974) ("We do not mean to imply that terms which recite the intended use or a property of composition can never be used to distinguish a new from an old composition.").

Therefore, in light of the above case law, because Kajisono simply does not teach, nor suggest, the structure of a motor that is configured to perform the function of

rotating blades in order to stir water within a water retention structure, Kajisono does not teach all the limitations of claims 1, 14 and 27. Thus, at least for this reason, these claims should be in condition for allowance.

Perhaps because the case law so clearly does recognize that functional limitations can be considered for purposes of determining the patentability of an apparatus claim, the Examiner also argues that "when the impellers/agitation member/blades rotate the water surrounding the impellers/agitation members/blades will be stirred somewhat." However, the Examiner provides no support for this conjecture, and Kajisono, in fact, teaches away from stirring the water. That is, as discussed above, Kajisono discloses impellers that specifically operate to create negative pressure in the capsule 32 in order to draw fluid into the capsule, not stir the water. *See* Kajisono at col. 4, lines 44-49.

In sum, Kajisono discloses a system for purifying and activating water that includes a plurality of apertures formed in a capsule. Kajisono, however, does not explicitly describe, or inherently disclose, an "agitator comprising at least one agitation member outwardly extending from a **lateral surface** of said distal end of said **drive shaft**, said motor configured to rotate said agitator in order **to stir water retained within the water retention structure**, wherein said at least one agitation member is operable **to stir the water within the water retention structure**" as recited in claim 1 of the present application. Additionally, Kajisono does not explicitly describe, or inherently disclose, "a **blade assembly** extending outwardly from said **drive shaft**, said

motor operable to rotate said blade assembly **in order to stir water retained within the water retention structure**" as recited in claim 14 of the present application. Further, Kajisono does not explicitly describe, or inherently disclose, an "agitator having at least **one blade** outwardly extending from a **lateral surface** of said **drive shaft** that is rotatably driven by said motor **in order to stir water retained within the water retention structure**" as recited in claim 27 of the present application. Thus, at least for these reasons, claim 1, 14, and 27, and the claims that depend therefrom, should be in condition for allowance.

C. Kajisono Does Not Teach, Nor Suggest, A "Base Removably Interconnected To A Cover"

Additionally, Kajisono does not explicitly describe, or inherently disclose, "a base removably interconnected to a cover," as recited in claim 1, "said cover being removably interconnected to said base" as recited in claim 14, or "a base removably secured to a cover" as recited in claim 27. Kajisono simply does not describe a base that snapably, latchably, or otherwise removably engages the cover. Kajisono discloses that "[t]he base plate 10 is provided with a cover 16 for enclosing the motor 40 in a water resistant manner." *See* Kajisono at column 4, lines 5-6. Kajisono, however, does not explicitly describe, or inherently disclose, a "base removably interconnected to a cover." Instead, Kajisono discloses a cover that includes an "inspection hole 80 for allowing an operator to view inside the cover." *Id.* at column 4, lines 20-22.

While Kajisono shows button-like protrusions extending upwardly from the lip of the cover 16 in Fig. 1, there is **absolutely nothing** in Kajisono to indicate that these protrusions are fasteners, and to assert otherwise is pure conjecture. Furthermore, even if one were to assume that these protrusions are fasteners, there is **absolutely nothing** in Kajisono to lead one to believe that these are features that removably interconnect a base to a cover. In order to anticipate a claim, **each and every element** as set forth in the claim must be found in the single prior art reference. MPEP, s*upra*. Kajisono simply does not explicitly describe, or inherently disclose, a "base removably interconnected to a cover."

For at least the reasons discussed above, Kajisono does not anticipate claims 1-12, 14-25, and 27-34 of the present application.

II. Claims 6, 19, And 31 Are Not Obvious In View Of Official Notice or Bengel

The Examiner asserts that, while Kajisono does not teach the limitation of "a seal member interposed between said cover and said base" as recited in claims 6, 19, and 31, claims 6, 19, and 31 are nonetheless unpatentable over Kajisono in view of Official Notice. The Examiner asserts that it would have been obvious in view of Official Notice to one having ordinary skill in the art at the time of the invention was made to have modified Kajisono's water agitation system so as to include a seal member interposed between the cover and the base in order to prevent leakage and/or infiltration and thus provide a better seal therebetween. *See* January 31, 2006 Office Action, at p. 5.

The Applicants respectfully traverse the assertions of Official Notice as further set forth below. Alternatively, if the assertions are based on the personal knowledge of the Examiner, then under MPEP § 2144.03(C) and 37 C.F.R. § 1.104(d)(2), the assertions should have been supported by an affidavit from the Examiner.

According to MPEP § 2144.03(A), Official Notice, without supporting references, should only be asserted when the subjects asserted to be common knowledge are "capable of instant and unquestionable demonstration as being well-known." That is, the subjects asserted must be of "notorious character" under MPEP § 2144.03(A). However, the Applicants respectfully submit that the subject matter of the assertion of Official Notice is not well-known in the art as evidenced by the searched and cited prior art. The Applicants respectfully submit that the Examiner performed "a thorough search of the prior art," as part of the Examiner's obligation in examining the present application under MPEP § 904.02.

Additionally, the Applicants respectfully submit that the Examiner's searched and cited references found during the Examiner's thorough and detailed search of the prior art are indicative of the knowledge commonly held in the art. However, in the Examiner's search of the relevant prior art, none of the prior art taught or suggested the subject matter of the assertion of Official Notice. The Applicants respectfully submit that if the subject matter of the assertion of Official Notice had been of "notorious character" and "capable of instant and unquestionable demonstration as being well-known" under MPEP § 2144.03(A), then the subject matter would have appeared to the

Examiner during the Examiner's search of the prior art. Consequently, the Applicants respectfully submit that the prior art does not teach the subject matter of the assertion of Official Notice.

The Applicants specifically challenge the Examiner's assertion of Official Notice with regard to the obviousness of modifying Kajisono's water agitation system so as to include a seal member interposed between the cover and the base, and the Applicants respectfully request the Board reconsider the assertion of Official Notice.

The Applicants' challenged the Examiner's assertion of Official Notice in the Applicants' November 15, 2005 Response as well, and in response the Examiner maintained the rejection based on Official Notice, but also cited Bengel for purposes of appeal as having been substituted for the Official Notice taken in the January 31, 2006 Office Action. *See* January 31, 2006 Office Action at p. 8.

Bengel is related to systems for qualification of chemical decontamination procedures for nuclear reactor coolant systems, and in particular, to an arrangement for test decontamination of reactor coolant pump seals for use in a test decontamination loop. Bengel at col. 1, lines 5-11.

First, claims 6, 19, and 31 are not unpatentable because the combination of Kajisono and Bengel does not teach, nor suggest, all the limitations of claims 6, 19, and 31. Neither Kajisono, nor Bengel, teaches or suggests an "agitator comprising at least one agitation member outwardly extending from a **lateral surface** of said distal end of said **drive shaft**, said motor configured to rotate said agitator in order **to stir**

water retained within the water retention structure, wherein said at least one agitation member is operable **to stir the water within the water retention structure**" as recited in claim 6, "a **blade assembly** extending outwardly from said **drive shaft**, said motor operable to rotate said blade assembly **in order to stir water retained within the water retention structure**" as recited in claim 19, or an "agitator having at least **one blade** outwardly extending from a **lateral surface** of said **drive shaft** that is rotatably driven by said motor **in order to stir water retained within the water retention structure**" as recited in claim 31. Therefore, claims 6, 19, and 31 are not obvious over Kajisono in view of Bengel.

Furthermore, in order for a *prima facie* case of obviousness to be established, the Manual of Patent Examining Procedure (MPEP) states the following:

> First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine the teaching. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must **both be found in the prior art, and not based on applicant's disclosure.**[20]

The law is well settled that "obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or

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[20] Manual of Patent Examining Procedure MPEP at § 2142, citing *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991) (emphasis added).

suggestion or incentive to do so."[21] It is not permissible to pick and choose among the individual elements of assorted prior art references to re-create the claimed invention, but rather "some teaching or suggestion in the references to support their use in the particular claimed combination" is needed.[22]

Additionally, if a *prima facie* case of obviousness is not established, Applicant is under no obligation to submit evidence of nonobviousness.

> The examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness. If the examiner does not produce a *prima facie* case, the applicant is under no obligation to submit evidence of nonobviousness.[23]

However, the Examiner did not provide any suggestion or motivation for a person of skill in the art to combine such disparate technologies as the water purifier of Kajisono with the nuclear reactor coolant systems of Bengel to arrive at the inventions of claims 6, 19, and 31. Without providing an incentive to combine the teachings of Kajisono and Bengel or even a reasonable expectation of success, it appears the Examiner picked and chose among isolated, individual elements of assorted prior art references to re-create the Applicants' claimed invention, and thus did not produce a *prima facie* case of obviousness. For at least these reasons, claims 6, 19, and 31 are patentable.

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[21] *ACS Hospital Systems, Inc. v. Montfiore Hospital*, 732 F.2d 1572, 1577, 221 USPQ 929 (Fed. Cir. 1984).
[22] *Symbol Technologies, Inc. v. Opticon, Inc.* 935 F.2d 1569, 1576, 19 USPQ2d 1241 (Fed. Cir. 1991)
[23] *See* Manual of Patent Examining Procedure MPEP at § 2142.

CONCLUSION

None of the references cited against the pending claims teaches, or suggests, an "agitator comprising at least one agitation member outwardly extending from a **lateral surface** of said distal end of said **drive shaft**, said motor configured to rotate said agitator in order **to stir water retained within the water retention structure**, wherein said at least one agitation member is operable **to stir the water within the water retention structure**" as recited in claim 1. Further, none of the references teaches, or suggests, "a **blade assembly** extending outwardly from said **drive shaft**, said motor operable to rotate said blade assembly **in order to stir water retained within the water retention structure**" as recited in claim 14. Finally, none of the references teaches, or suggests, an "agitator having at least **one blade** outwardly extending from a **lateral surface** of said **drive shaft** that is rotatably driven by said motor **in order to stir water retained within the water retention structure**" as recited in claim 27. Therefore, the Applicants respectfully submit that all the pending claims are patentable over the cited art.

Furthermore, with respect to the rejection of claims 6, 19, and 31 as being unpatentable over Kajisono in view of Bengel, the Examiner has merely picked and chosen among isolated, individual elements of assorted prior art references to re-create the Applicants' claimed invention.

As discussed above, the Applicants respectfully submit that the pending claims are allowable in all respects. Therefore, the Board is respectfully requested to reverse

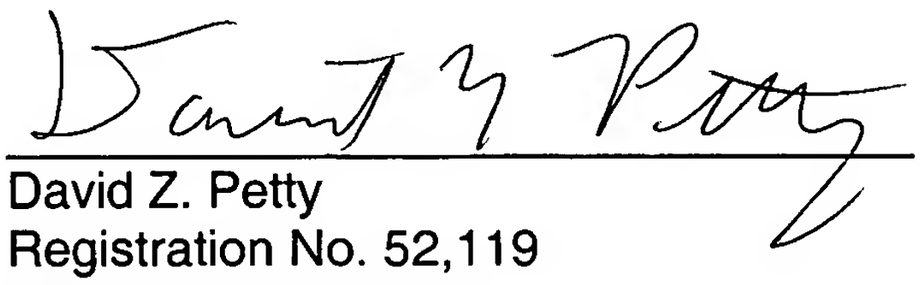
the rejections of pending claims 1-12, 14-25, and 27-34.

PAYMENT OF FEES

The Commissioner is authorized to charge the fee for this appeal brief ($250) and any additional fees or credit overpayment to Deposit Account 13-0017.

Dated: April 13, 2006

Respectfully submitted,



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CLAIMS APPENDIX
(37 C.F.R. § 41.37(c)(1)(viii))

1. A water agitation system configured to be positioned within a water retention structure configured to receive and retain water, said system comprising:

a main body positionable within a water retention area of the water retention structure, said main body comprising a base removably interconnected to a cover, and an inner compartment defined between said base and cover; and

an agitator operatively connected to a motor housed within said main body, said agitator connected to a distal end of a drive shaft that extends outwardly from said main body, said agitator comprising at least one agitation member outwardly extending from a lateral surface of said distal end of said drive shaft, said motor configured to rotate said agitator in order to stir water retained within the water retention structure, wherein said at least one agitation member is operable to stir the water within the water retention structure,

said motor being positioned within said inner compartment.

2. The water agitation system of claim 1, wherein said water retention structure is a basin of a bird bath.

3. The water agitation system of claim 1, wherein said water retention structure is a livestock water trough.

4. The water agitation system of claim 1, wherein said water retention structure is one of a swimming pool, water tower, and pond.

5. The water agitation system of claim 1, said cover is dome shaped.

6. The water agitation system of claim 5, further comprising a seal member interposed between said cover and said base.

7. The water agitation system of claim 1, further comprising a support member configured to support said main body above a bottom surface of the water retention structure.

8. The water agitation system of claim 7, wherein the support member comprises a plurality of legs that extend downwardly from said main body.

9. The water agitation system of claim 1, wherein said motor is battery powered.

10. The water agitation system of claim 1, wherein said motor is electrically connected to a standard electrical outlet.

11. The water agitation system of claim 1, further comprising at least one of a timer and sensor for selectively activating and deactivating said motor.

12. The water agitation system of claim 1, wherein said at least one agitation member comprises at least one blade outwardly extending from a lateral surface of said drive shaft that is rotatably driven by said motor.

14. A water agitation system for use with a water retention structure comprising:

a motor operatively connected to a proximal end of a drive shaft;

a base supporting said motor;

a cover positioned over said motor, said cover being removably interconnected to said base, and an inner compartment defined between a perimeter of said base and said cover, said motor being positioned within said inner compartment; and

a blade assembly extending outwardly from said drive shaft, said motor operable to rotate said blade assembly in order to stir water retained within the water retention structure.

15. The water agitation system of claim 14, wherein said water retention structure is a basin of a bird bath.

16. The water agitation system of claim 14, wherein said water retention structure is a livestock water trough.

17. The water agitation system of claim 14, wherein said water retention structure is one of a swimming pool, water tower, and pond.

18. The water agitation system of claim 14, wherein said cover is dome shaped.

19. The water agitation system of claim 18, further comprising a seal member interposed between said cover and said base.

20. The water agitation system of claim 14, further comprising a support member configured to support said water agitator above a bottom surface of the water retention structure.

21. The water agitation system of claim 20, wherein the support member comprises a plurality of legs that abut said bottom structure of the water retention area.

22. The water agitation system of claim 14, wherein said motor is battery powered.

23 The water agitation system of claim 14, wherein said motor is electrically connected to a standard electrical outlet.

24. The water agitation system of claim 14, further comprising at least one of a timer and sensor for selectively activating and deactivating said motor.

25. The water agitation system of claim 14, further comprising at least one blade extending from a lateral surface of said drive shaft that is rotatably driven by said motor.

27. A water agitation system adapted to be positioned within a water retention structure configured to receive and retain water, said system comprising:

a main body positioned within a water retention area of the water retention structure, said main body having a base removably secured to a cover, and an inner compartment defined between said base and cover,

support members supporting said main body above a bottom surface of the water retention structure; said support members comprising a plurality of legs that extend downwardly from said main body;

an agitator operatively connected to a motor positioned within said inner compartment of said main body, said agitator connected to a distal end of a drive shaft that extends outwardly from said main body, said agitator having at least one blade outwardly extending from a lateral surface of said drive shaft that is rotatably driven by said motor in order to stir water retained within the water retention structure.

28. The water agitation system of claim 27, wherein said water retention structure is a basin of a bird bath.

29. The water agitation system of claim 27, wherein said water retention structure is a livestock water trough.

30. The water agitation system of claim 27, wherein said water retention structure is one of a swimming pool, water tower, and pond.

31. The water agitation system of claim 27, further comprising a seal member interposed between said cover and said base.

32. The water agitation system of claim 27, wherein said motor is battery powered.

33. The water agitation system of claim 27, wherein said motor is electrically connected to a standard electrical outlet.

34. The water agitation system of claim 27, further comprising at least one of a switch, timer and sensor for selectively activating and deactivating said motor.

EVIDENCE APPENDIX
(37 C.F.R. § 41.37(c)(1)(ix))

(1) United States Patent No. 5,336,399 ("Kajisono"), entered into record by Examiner in December 29, 2004 Office Action.

(2) United States Patent No. 5,465,279 ("Bengel"), entered into record by Examiner in January 31, 2006 Office Action.

(3) United States Patent No. 3,836,130 ("Earhart"), entered into record by Examiner in July 2, 2004 Office Action.

(4) United States Patent No. 4,166,086 ("Wright"), entered into record by Examiner in July 2, 2004 Office Action.

RELATED PROCEEDINGS APPENDIX
(37 C.F.R. § 41.37(c)(1)(x))

Not applicable.